No. 14777

IN THE

# United States
# Court of Appeals
## For the Ninth Circuit

HENRY E. RUBELT, by Raymond Edward Ashby, his grandson and next friend,

*Appellant.*

vs.

D. O. BYBEE and W. A. BYBEE,

*Appellees.*

# APPELLANT'S BRIEF

*Appeal from the United States District Court for the District of Idaho, Southern Division*

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## I

## STATEMENT OF JURISDICTION

Appellant, Henry E. Rubelt, by Raymond Edward Ashby, his grandson and next friend, commenced this action as plaintiff against appellees, then defendants, in the United States District Court for the District of Idaho, Southern Division, on May 15, 1953, asking for the cancellation of certain lease and option agreements relating to real property located

in the State of Idaho, and for money damages. Final judgment in favor of appellees was entered by the Honorable Fred M. Taylor, District Judge, on March 2, 1955 (37)*. Notice of Appeal to this Court was filed on March 18, 1955 (38)**.

Plaintiff is a citizen of the State of Idaho. Defendants are citizens of the State of Oregon. The amount in controversy, exclusive of interest and costs, exceeds the amount of Three Thousand ($3,000.00) Dollars. The District Court's jurisdiction in the action was based on Title 28, U.S.C.A. Sections 1332 and 1655. This Court has jurisdiction to determine this appeal under Title 28, U.S.C.A., Section 1291, and Rule 73, Federal Rules of Civil Procedure.

## II

## STATEMENT OF THE CASE

On or about April 12, 1950, the plaintiff, Henry Rubelt, was the owner of approximately 2,500 acres of deeded land in Owyhee County, State of Idaho (12), held as lessee certain State Land Leases for approximately 2,500 acres of grazing land (43), and possessed a Class I grazing right on Federal lands under the jurisdiction of the United States Bureau of Land Management for 450 cattle and 25 horses (72, 73). This cattle ranch contained 300 acres of meadow or hay land from which 350 tons of hay were cut yearly (43). On it stood a large ranch house, outbuildings, corrals and a barn, and two large

*Arabic Numerals in parenthesis refer to pages of the Transcript of Record.

**The parties will be referred to as plaintiff and defendants in this Brief.

reservoirs had been constructed which provided the ranch with ample water to irrigate the hay land in the summer months (51), all of which at that time were in good condition (54). At the time of the transaction which is the basis of this action, the plaintiff, Henry Rubelt, was an elderly man 82 years of age (70, 71), childish in his ways (50), living in the past (50, 128), very hard of hearing, of failing eyesight (126), and memory (128, 129, 147, 159), while the defendant, D. O. Bybee, acting as a partner of the defendant, W. A. Bybee (204), was a man with extensive ranch and irrigated land holdings in two states and actively engaged in their management (226).

On April 12, 1950, the defendant, D. O. Bybee, and the plaintiff, Henry Rubelt, entered into a lease and option agreement whereby the defendants acquired a lease of the Rubelt ranch for a period of ten years at a rental of $3,000.00 per year with an option to purchase the ranch at the end of the ten year period for the sum of $40,000.00, all rental payments to apply against the purchase price, the plaintiff, Henry Rubelt, to pay all taxes and state land lease rental charges for the term of the lease and the principal sum to bear no interest until the option was exercised (11-24). The taxes and state land lease rentals amounted to approximately $800.-00 yearly (46). This agreement was drawn by attorney, Perce Hall, who acted for both the parties and assessed his fees against both (214).

In December of 1950 plaintiff and defendants en-

tered into an amended contract whereby the agreement of April 12, 1950 was modified to provide for a five year option period, being the last five years of the term (24-29).

At the time the agreements of lease and option were entered into the Rubelt ranch had a fair market value of several times the price agreed upon. The witness, Albert Harley, a County Commissioner of Owyhee County, Idaho and a resident of the county for over seventy years, stated the value to be $95,000.00, and testified that in his opinion the fair rental value of the property was $6,000.00 to $7,000.00 per year (144). Appraiser Herschel Davidson estimated the value to be between $60,000.00 and $70,000.00, based upon his valuation of the 475 head grazing right at $125.00 to $150.00 per head (168). Appraiser Edwin Newell valued the ranch at $150.00 per cow unit, or approximately $70,000.00 (180).

Concerning the jurisdictional question, it was urged by defendants and found by the District Court that the defendant, D. O. Bybee, at the time of the filing of this action, was a citizen of the State of Idaho (34). However, Mr. Bybee's own testimony showed that he was in fact domiciled in the State of Oregon, as will more fully appear in Argument.

This action was commenced to procure cancellation of these agreements on the ground that they are grossly inequitable, and taking into account the infirmities of plaintiff at the time of their execution, amount to constructive fraud.

## III

## SPECIFICATION OF ERRORS

1. The lower court erred in making Finding of Fact I, in that the testimony of the defendant, D. O. Bybee, clearly showed that at the time of the filing of this action, he was a resident and citizen of the State of Oregon.

2. The lower court erred in making Finding of Fact IV, in that the undisputed evidence was that the plaintiff, Henry Rubelt, during the period when these transactions took place, was infirm in mind and body and wholly incompetent to transact and carry on his business.

3. The lower court erred in making Finding of Fact V because the agreements are so patently unfair, deceptive and inequitable that, taken with the infirmities of plaintiff they amount to constructive fraud.

4. The lower court erred in failing to decree cancellation of these agreements on the ground of constructive fraud.

## IV

## ARGUMENT

I. The defendant, D. O. Bybee, at the time of the filing of the complaint herein, was a citizen of the State of Oregon, and hence the District Court had jurisdiction of the action by reason of the diversity of citizenship of the parties.

It is conceded that the plaintiff, Henry E. Rubelt, is now and for over fifty years has been a citizen of the State of Idaho. The defendant, W. A. Bybee, is admitted to be a citizen and resident of the State of Oregon. Thus, if the defendant, D. O. Bybee, at the time of the filing of the complaint was a citizen of the State of Oregon, or at least not a citizen of the State of Idaho, then diversity of citizenship of the parties exists to sustain federal jurisdiction.

The testimony of the defendant, D. O. Bybee, revealed that, at the time of the filing of this action, he was physically residing in the State of Oregon from 65% to 80% of the time (191), that when he was in Idaho it was only in connection with his ranching business and that he lived in a furnished room at the Rubelt ranch. The only personal effects he brought into Idaho with him were the clothes on his back (192). His driver's license was an Oregon permit, on which he gave as his home address, "Route 2, Nyssa, Oregon" (197). He had never applied for nor purchased an Idaho driver's license (200). His income tax returns for the 1952 tax year gave his home address as Nyssa, Oregon (200). His Packard automobile is registered in the State of Oregon (201). Virtually all of his personal effects, household goods, furniture and personal belongings are at his Oregon home. His wife and children live there, and his children attend Oregon schools (202, 203). His status was well summed up by his own testimony in reply to a question about where he spent his week-ends.

Mr. Bybee said, "I generally go home on week-ends, to Nyssa." (193).

Under these circumstances it seems quite obvious that the defendant, D. O. Bybee, at the commencement of this action, was domiciled in the State of Oregon, and requisite diversity of citizenship did exist.

The requirements for citizenship upon which federal jurisdiction rests are stated in 1 Cyclopedia of Federal Procedure (2d Ed.) p. 465, Section 191:

> "To constitute citizenship of a state in a jurisdictional sense there must be, or have been, residence within the state and an intention that such residence shall be permanent, in which sense state citizenship means the same as 'domicile', in its general acceptation. 'Citizenship' and 'residence' are not synonymous, and residence alone does not necessarily determine domicile and may even be temporarily in a different state, notwithstanding the fact that the definition of of 'citizens' in the Fourteenth Amendment to the Constitution refers to the states wherein 'they reside'. Domicile or 'citizenship' is a matter of more or less permanent status and a condition of mental attitude rather than of physical presence."

Bouviers Law Dictionary defines domicile as "that place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning."

Here the most that Mr. Bybee can claim is that he physically resided a small fraction of the year in the State of Idaho where he has business interests. The bulk of his physical residence was in Oregon, and it was in Oregon, of course, that all or nearly all of the incidents of domicile and citizenship are found.

A case squarely in point is *Harton v. Howley*, 155 F. 491, 493 (C.C.W.D. Pa. 1907). In that case for many years the plaintiff had been a citizen of the State of Pennsylvania. Two years before commencement of the suit he became superintendent of a company engaged in drilling oil wells. A year later the company's operations centered in Ohio and plaintiff, to be near the work, established a residence in Ohio leaving his wife and son in Pennsylvania. In Ohio he lived in a furnished room, and he returned to the Pennsylvania home of his wife and son on Sundays. He claimed that he desired to move his wife and son to Ohio and had been endeavoring to sell the Pennsylvania property so this could be accomplished. In finding that he was in fact a citizen of and domiciled in the State of Pennsylvania the court said:

> "The question for determination, then, is whether the plaintiff is a resident of Ohio or Pennsylvania, and under the pleadings in the case the burden of showing he is not a resident of the former state rests upon the defendant. 'To effect a change of citizenship from one state to another there must be an actual removal, an actual change of domicile, with a bonafide intention of abandoning the former place of resi-

dence and establishing a new one, and the acts of the party must correspond with such purpose.' Kemna v. Brockhaus, et al. (C.C.) 5 Fed. 762. 'Domicile of origin must be presumed to continue until another sole domicile has been acquired by actual residence, coupled with the intention of abandoning the domicile of origin.' Prue v. Prue, 156 Pa. 617, 27 Atl. 291. Applying these principles to the case in hand, and having regard to the employment of the plaintiff, the situation of his family, and all the facts and circumstances surrounding his and their acts during the past two years, I am impressed with the conviction that his real residence and citizenship are in Pennsylvania and that his situation is rather that of one who proposes eventually if family circumstances will permit and his employment so dictates, to change his place of residence permanently, rather than that of one who has already done so."

*Arcadian Knitting Mills, Inc. v. Minowitz*, 51 F. Supp. 601, (D.C. E.D. Pa. 1943) was a case where the defendant moved to dismiss the complaint on the ground that he was a citizen of New York, not of Pennsylvania, and hence no diversity of citizenship was present. The facts showed that defendant physically resided in Pennsylvania where he was employed, while his family lived in Brooklyn, New York. The defendant had stated New York to be his home when he registered for the Selective Service, he filed his income tax returns in New York, the greater part of his

clothing, effects and possessions were in the Brooklyn, New York home and he stated that he came back to his Brooklyn home whenever business permitted. The court held that the defendant was a citizen of New York where the incidents of domicile and citizenship had existed.

See also: *Caldwell v. Firth*, 91 F. 177 (C.C.A. 5th, 1898)

Defendant's effort to transpose his state of domicile from Oregon to Idaho rests almost entirely on his statement that he considers Idaho to be his home. All of the facts are to the contrary.

The case of *Stine v. Moore*, 213 F. (2d) 446, 448 (U.S.C.A. 5th, 1954) disposes of the mental approach to domicile in the following language:

> "Residence alone is not the equivalent of citizenship, although the place of residence is prima facie the domicile; and citizenship is not necessarily lost by protracted absence from home, where the intention to return remains. Mere mental taking of citizenship is not sufficient. What is in another man's mind must be determined by what he does as well as what he says."

Applying the facts of this case to the applicable rules of law there seems no doubt but that the defendant, D. O. Bybee, was a citizen of the State of Oregon when this action was commenced and that accordingly jurisdiction of the action was properly in the Federal District Court of Idaho.

II. At the time these transactions were entered into the plaintiff, Henry E. Rubelt, was so infirm in mind and body as to be wholly incompetent to carry on and transact business affairs. The agreements are so patently unfair, deceptive and inequitable that, taken with the infirmities of plaintiff, they amount to constructive fraud and should be cancelled as a matter of law.

In order to fully appreciate the gross unfairness of these contracts, their terms must be carefully analyzed and then related to the undisputed testimony concerning the fair market value of the property at the time of the transactions.

These contracts provide that the plaintiff lease to the defendants his large cattle ranch for the sum of $3,000.00 per year for a ten year period, plaintiff to pay taxes and state land lease rentals amounting to $800.00 per year. Even if the agreements stopped there a serious question would arise as to adequacy of consideration, for the uncontroverted evidence was that the ranch had a fair rental value at that time of from $6,000.00 to $7,000.00 per year (144). Moreover, this testimony was given by the witness Albert Harley, a County Commissioner of Owyhee County, Idaho, whose official duties involve an intimate knowledge of property values, and who had personally resided in the area as a working stockman and rancher for over seventy years (138-142).

But the agreements do not stop there. They go on to provide that the defendants have an option to pur-

chase the property at any time during the last five years of the tenancy for the sum of $40,000.00, with all rental payments to be credited against the purchase price. Obviously the option would not be exercised until the end of the term, at which time $10,000.00 would remain to be paid on the purchase price.

The vice of the transaction is this: Defendants have signed plaintiff up to a deal which credits rent against purchase price in a manner which is not uncommon as to depreciating personalty, but which, as to non-depreciating real property, is not only unusual, but highly delusive. Defendants took advantage of plaintiff to put themselves in a position to purchase a $70,000.00 to $90,000.00 ranch for $10,000.00, by agreeing to rent it first for ten years at $3,000.00 a year.

By this strategem they made it appear as a $40,000.00 deal. In reality, adjusting for plaintiff's payment of the taxes and lease payments, it is a non-interest bearing $2,000.00 deal.

The nominal $40,000.00 price bears no interest; the balance payable at the time of exercise of the option ($10,000.00 at the end of ten years), bears 3% interest until paid, but the land lease rentals of approximately $8,000.00 paid by plaintiff over the term amount to additional credit extended defendants without interest, which more than offsets the interest obligation on the remaining balance.

The picture is even darker when we consider the

true rental value of the property. Over the ten year period the ranch should have brought a fair rental price of at least $6,000.00 yearly (144). The $3,-000.00 difference yearly amounts to $30,000.00 for the term. Thus, the plaintiff actually receives $30,-000.00 less than its true rental value by virtue of these agreements, and in addition virtually gives his ranch away. A more outrageous business deal would be hard to imagine, and certainly no one of ordinary common sense would have submitted to such a proposal.

But here we are not dealing with a person of ordinary common sense. Mr. Rubelt was an old man. His memory was faulty. He could not even recognize old friends when he met them (128). He could not see (126). His hearing was bad (126). He would fall asleep while eating (128). Counsel for defendants actually asked Mr. Rubelt if he took care of his own business and the plaintiff replied, "No, I can't see no more and I can't hear no more." (110). Under these circumstances we believe the law will relieve this aged and incompetent man of the onerous and unfair agreements he entered into without the ability or capacity to comprehend their meaning or result.

It is well established that gross inadequacy of consideration may by itself constitute conclusive evidence of fraud. This rule is set out in I Black on Rescission and Cancellation, 2d Ed., 499, Sec. 175, in the following language:

"Equity may decree the rescission and can-

> cellation of a contract of conveyance where such a gross inadequacy of consideration is shown as to shock the conscience because in this case the disparity between the value of the subject and the consideration given for it is regarded as raising an irrefragible presumption of fraud, or (according to most of the authorities) as constituting in itself conclusive evidence of fraud."

Inadequacy of price sufficient to establish fraud is defined by Lord Thurlow in the English decision, *Gwynne v. Heaton*, 1 Brown, Ch. 1, 9:

> "An inequality, so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."

When due consideration is given to the actual fair market value of this property at the time of these transactions and its fair rental value at that time, and when these factors are related to the terms of the lease and option agreements, and to the fact that Mr. Rubelt was required by the agreements to pay the land lease rentals and taxes and received no interest on the principal during the ten-year lease period, it seems impossible to us that the deal could be explained to a man of ordinary common sense without producing, as Lord Thurlow stated, "an exclamation at the inequality of it."

But even if the court should feel that such inade-

quacy of price might not alone constitute conclusive evidence of fraud, it nevertheless requires only slight additional evidence of overreaching on the part of defendants, or incompetence on the part of plaintiff, to warrant rescission and cancellation of these contracts.

55 Am. Jur. 567, Vendor and Purchaser, Section 91, states the general law:

> "In connection with other circumstances, however, the inadequacy of the price may stamp the transaction with the element of fraud on the part of the purchaser, and warrant relief in equity by way of rescission upon the ground of fraud * * *. Certainly, gross inadequacy of the price may in connection with other circumstances slight in their nature, amount in itself to conclusive and decisive evidence of fraud for which a court of equity will afford relief by way of rescission. If, in addition to gross inadequacy of price, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner or a party interested in the property has been misled or surprised, the sale will be regarded as fradulent. *Relief on the ground of fraud has frequently been granted in connection with weakness of mind or impaired mental capacity on the part of the vendor.*" (Emphasis Supplied)

To the same effect is 2 Pomeroy's Equity Jurisprudence, (4th Ed.) 1940-1944, Section 928:

> "If there is nothing but mere inadequacy of price, the case must be extreme in order to call for the interposition of equity. Where the inadequacy does not thus stand alone but is accompanied by other inequitable incidents, the relief is much more readily granted . . . When the accompanying incidents are inequitable, and show bad faith, such as concealment, misrepresentation, undue advantage, oppression on the part of the one who obtained the benefits, *or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances combined with inadequacy in price, may easily induce a court to grant relief, defensive or affirmative.*" (Emphasis Supplied)

The decision most similar on its facts to the instant case is *Allore v. Jewell*, 94 U.S. 506, 523, 24 L. Ed. 260, 264. There, a woman, sixty to seventy years old, sick, mentally weak and confused, sold property valued from $6,000.00 to $8,000.00 for $250.00 down, an annuity of $500.00 for life, the defendant to pay all of her doctor bills during her lifetime, the property taxes for the year of the sale, and the old lady to have free use of the house existing on the property for approximately six months. The evidence also disclosed that the terms of the proposition were devised by the woman herself. Shortly after entering into this transaction the woman died. In setting aside this transaction the Supreme Court of the United States said:

"The same doctrine is announced in adjudged cases, almost without number; and it may be stated as settled law that, whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. And the present case comes directly within this principle. * * * The principle upon which the court acts in such cases, of protecting the weak and dependent, may always be invoked on behalf of persons in the situation of the deceased spinster in this case, of doubtful sanity, living entirely by herself, without friends to care for her, and confined to her house by sickness. As well on this ground as on the ground of weakness of mind and gross inadequacy of consideration, we think the case a proper one for the interference of equity, and that a cancellation of the deed should be decreed. * * * The decree of the court below is reversed and the cause remanded, with directions to enter a decree as thus stated."

See also: *Hume v. United States*, 132 U.S. 464, 33 L. Ed. 393; *Adams Exp. Co. v. Scofield*, 64 S.W. 902 (Tenn. 1901); *Swink v. City of Dallas*, 36 S.W. (2d) 222 (Texas 1931); *Sizemore v. Miller*, 247 P. (2d) 224 (Oregon 1952).

Other cases setting aside conveyances where gross inadequacy of consideration existed are: *Robert v. Finberg*, 85 Conn. 557, 84 Atl. 366, where property worth $25,000.00 had been sold for $5,000.00, and *Lavette v. Sage*, 29 Conn. 577, where the appellate court set aside a conveyance of land worth $7,000.00 which had been sold for $1,000.00.

## V

## CONCLUSION

This is a case without conflicting evidence. All of the independent testimony shows the Rubelt ranch to have had a fair market value at the time of these transactions ranging from $70,000.00 to $90,000.00. Its fair rental value was $6,000.00 to $7,000.00 per year. In contrast, old Mr. Rubelt was induced to lease it for ten years for less than half of the fair rental price, and bound himself to sell it at the end of the term for a mere fraction of its true value, to pay the taxes and land lease rentals himself, and all of this without interest. Perhaps the plainest proof of the old gentleman's incompetence is the fact that he agreed to such obviously oppressive and unreasonable terms.

The jurisdiction of the District Court is equally apparent. D. O. Bybee maintained his permanent home in Oregon. His periods of residence in Idaho were related solely to his business affairs, and consisted of nothing more than transient episodes of

temporary separation from his Oregon home and family.

The gross inadequacy of consideration inherent in the agreements here in question, and their deceptive and illusory character, taken with the mental and physical infirmities of the plaintiff, warrant the cancellation of the agreements and a restoration of plaintiff to his original position. Accordingly, it is respectfully urged that this Court reverse the judgment of the District Court and decree these lease and option contracts cancelled.

Respectfully submitted,

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